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**BUILDING AN OBLIGATION TO INTERVENE IN
RESPONSE TO GENOCIDE: GOING BEYOND
THE RATIONALE OF JUSTIFIED
INTERVENTION - LESSONS FROM RWANDA**

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Abstract

Genocide is universally accepted as an international crime, the prohibition of which constituting a jus cogens norm of international law. However, the duty to prevent genocide, as contained in the Convention on the Prevention and Punishment of the Crime of Genocide was left largely unexplored for more than forty years after the Convention was signed in 1948. Thus, the nature, scope and ambit of the duty is instrumental to the debate on humanitarian intervention in response to genocide - does the Convention, in light of its recognition of genocide as an international crime, require intervention of a military or non-military nature in order to prevent or halt the commission of the crime, or does it simply obligate state parties to 'take care of their own backyard' and thus merely enable them to bring genocide committed outside their sphere of interest to the attention of the United Nations if they so wish?

This paper seeks to evaluate the extent of the duty prevent, both at the time the Convention was signed and also through the effect of subsequent state practice, to determine whether there appears to be an emerging rule of customary international law that establishes an obligation to intervene. The tragic events of the Rwandan genocide are considered as the primary case study. It compares the actions taken by the international community at the outbreak of violence next to those taken in other contemporary conflicts in an attempt to deduce an emerging pattern in contemporary state practice. As a result, the paper takes the position that if such an obligation exists, it is one that must rightfully lie with the United Nations, as the legitimate representative of all states, bearing in mind the established principles governing the non use of force other than in self defence, or if mandated by the Security Council under Chapter VII of the Charter of the United Nations. A state's individual duty to prevent genocide occurring outside their territorial interests would then extend to a requirement to support any United Nations intervention in response to it. Ultimately however, these arguments to date lack settled state practice to support them - something that needs to be addressed if the international community is to truly realise and enforce the erga omnes obligation to prevent genocide.

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The United States and the international community must take action. If the horrors of the Holocaust taught us anything, it is the high costs of remaining silent and paralysed in the face of genocide.

President Clinton, on the war in Bosnia, 4 August 1992¹

The international community...must bear its share of responsibility for this tragedy, as well. We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe havens for the killers. We did not immediately call these crimes by their rightful name: genocide. ...We owe to all the people in the world our best efforts to organize ourselves so that we can maximize the chances of preventing these events. And where they cannot be prevented, we can move more quickly to minimize the horror.

President Clinton, on the Rwandan genocide, 25 March 1998²

I INTRODUCTION

On 6 April 1994, savagery unmatched since World War II engulfed Rwanda while a subdued international community watched from afar for the ensuing 100 days. It was orchestrated by the few, yet carried out by the many, leaving in the finish at least 800,000 Tutsi and moderate Hutu Rwandans murdered - one third of which were children, not to mention the over one million wounded and maimed.³ These were the high costs of remaining silent and paralysed in the face of genocide that President Clinton preached of two years prior. Yet, to his Administration in 1994, this was "black on black" violence in which the West should not intervene; it was not genocide, but rather "tribal hatred" and a "breakdown of the ceasefire agreement" from the recently *resolved* civil war.⁴ At best the Administration would concede that "acts of genocide may have occurred", but not genocide itself.⁵

Much has been said about the failure of the international community, notably the United States and the United Nations Security Council, to intervene in order to halt the violence and killing. If the law and politics concerning the use of military force for the purposes of humanitarian intervention were being re-evaluated after the

¹ See "Um, Was It Something I Said?" (14 February 1994) *Time Magazine* New York 14.

² Bill Clinton, President of the United States (Speech to genocide survivors, Kigali Airport, Rwanda, 25 March 1998) reproduced in US Department of State International Information Programs "Transcript: Clinton Meets with Rwandan Genocide Survivors" <<http://usinfo.state.gov/products/pdq/pdq.htm>> (last accessed 13 July 2002).

³ Gérard Prunier *The Rwanda Crisis 1959-1994: History of a Genocide* (Hurst & Co, London, 1995) 261-265.

⁴ Reasoning of the Clinton Administration and British Foreign Office, cited in Geoffrey Robertson *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Group, Middlesex, 2000) 72.

⁵ Mike McCurry, US State Department Spokesperson (25 May 1994) Press Briefing <<http://www.pbs.org/wgbh/pages/frontline/shows/evil/etc/slaughter.html>> (last accessed 28 August 2002). For detail on the controversy over this formulation see also Philip Gourevitch *We Wish to Inform You that Tomorrow We will be Killed with Our Families* (Farrar Straus and Giroux, New York, 1998) 152; and see below Part III B 1 April to June 1994: to charge or not to charge genocide.

embarrassment of Mogadishu in 1993, then why were non-military counter-measures not seen as a viable alternative? For example, if the United Nations was determined to save succeeding generations from the scourge of war, why then did it not authorise jamming of the airwaves in the face of direct and public incitement to commit genocide by Radio Télévision Libre des Mille Collines (RTLM) if military intervention could not be achieved?

Perhaps the question is better focused on why the international community was so reluctant to call this situation by its rightful name: genocide. One argument - one this paper will advance - is that such acknowledgement was believed to be tantamount to an admission they had an obligation to intervene by dint of the command in Article I of the Genocide Convention which places a duty upon states "to prevent" genocide.⁶ By avoiding a declaration that genocide was taking place, it was possible to circumvent the Convention obligations. What is interesting for the purposes of this paper are the deeper implications of such an act - if customary international law is reflective of state practice, and the Genocide Convention is reflective of customary international law, with genocide constituting a *jus cogens* crime, then could the deliberate avoidance of affirming Rwanda was in the midst of a genocide be seen to be implicit recognition for the existence in customary international law of a legal obligation to intervene in response to genocide itself?

This paper will traverse the legal, political, and moral implications of the duty to prevent, as established by the Genocide Convention, in an attempt to answer these questions. Subsequent practice, including state action, judicial interpretation, and contemporary academic commentary following its coming into force, will be analysed in order to assess the development of the ambit and nature of the duty to prevent genocide. The impact of this on the law and politics of humanitarian intervention, both of a military and non-military character, will then be explored. The aim is to show how intervention was not only justified and legal in the case of Rwanda, but also how Rwanda sets a precedent to ensure intervention is not withheld in subsequent cases of genocide. Perhaps then future actions of world leaders will live up to the promises of their impassioned rhetoric.

⁶ Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277, art I. The Preamble and Articles I-IX of the Convention are appended to the end of this paper.

II LEGAL OBLIGATIONS UNDER THE GENOCIDE CONVENTION

There can be little argument that the principles espoused in the Genocide Convention have made their way into the corpus of customary international law. It is equally clear that the crime of genocide is universally condemned and cannot go unpunished. Further, General Assembly Resolution 96(I) of 1946, in calling for the drafting of a convention on genocide, noted that as this was an act "contrary to moral law and to the spirit and aims of the United Nations", international co-operation should be organised "with a view to facilitating the speedy prevention..." of this crime.⁷ This notion of prevention survived the drafting sessions to be enshrined in the final draft not only in the text, but placed alongside the aim of punishment in its title.

Following the tragedy of Rwanda, academic commentators commonly, and somewhat boldly, asserted that the duty of prevention under the Genocide Convention obligated parties to it to intervene in response to genocide,⁸ and by failing to do so the international community had breached the Convention's commands. Thus, the need to determine the scope, ambit, and effect of this duty on the obligations of contracting parties is instrumental to this debate.

A The Drafting History

During the drafting session debates, the Polish representative commented that "victims of genocide could derive but meagre satisfaction from seeing the guilty persons brought to justice after the crime has been committed; it would be better to prevent the crime from being committed."⁹ Nevertheless, in spite of a purely punitive regime not being favoured by the contracting parties to the Convention, there was still little in it to suggest what prevention of genocide actually meant.¹⁰ Rules of interpretation under the law of treaties can assist in this situation: any interpretation

⁷ GA Res 96(I) (11 December 1946) UN Doc A/64/Add.1.

⁸ For example: "The genocide convention...imposed a legal obligation on those states who ratified it to intervene whenever genocide was suspected" Linda Melvern "Genocide Behind the Thin Blue Line" (1997) 28(3) Security Dialogue 333, 333-334; "the December 1948 international convention on the repression of genocides...made it mandatory for any of its signatories to take immediate action once a genocide had been clearly identified" Gérard Prunier *The Rwanda Crisis 1959-1994: History of a Genocide* (Hurst & Co, London, 1995) 274-275.

⁹ *Continuation of the Consideration of the Draft Convention on Genocide* (6th Comm, 3d Sess, 84th Mtg, 1948) UN GAOR 241.

¹⁰ William A Schabas *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, Cambridge, 2000) 72.

must be in accord "with the ordinary meaning to be given to the terms of the treaty in their context and in light of the treaty's object and purpose." If this meaning is ambiguous, recourse may also be had to the preparatory work of the treaty and the circumstances surrounding its conclusion.¹¹ Such recourse in this case should, in the very least, help to discover what the duty to prevent does not entail.

1 *The 'duty to prevent' under the Secretariat draft*

To begin with, the Secretariat draft proposed the criminalisation of preparatory acts such as:¹²

- (a) studies and research for the purpose of developing the technique of genocide;
- (b) setting up of installations, manufacturing, obtaining, possessing or supplying of articles or substances with the knowledge that they are intended for genocide;
- (c) issuing instructions or orders, and distributing tasks with a view to committing genocide

By their very nature, these prohibitions are inherently preventative in form and substance, in spite of their equally punitive measure. Should they have survived the drafting debates¹³ and been included in the Convention itself, then the question of obligatory intervention could have been obscured by arguments that the treaty's true object and purpose centred around the move to stamp genocide out at its source by punitive sanction for all possible acts that may culminate in genocide. In this situation there would not be a need for intervention because the planned genocide would never take place. Of course, while this argument may reflect the ideals of the draft Convention, it does not reflect reality when most commonly evidence of preparatory acts does not come to light until after the genocide has begun.

With its deletion, the duty of prevention became more equivocal. The other two preventative provisions, paragraph 3 of the preamble and Article XII, are particularly interesting. The former stated that the Contracting Parties "pledge themselves to

¹¹ Vienna Convention on the Law of Treaties (22 May 1969) 1155 UNTS 331, arts 31-32.

¹² Draft Convention on the Crime of Genocide (May 1947) UN Doc E/447, art II(1)(2)(a-c). See also Pieter Drost *Genocide: United Nations Legislation on International Criminal Law* (A W Sythoff, Leyden, 1959) 8-28 for detailed commentary on the draft; the text of the draft is reproduced in Schabas, above, 553 (appendix).

¹³ In fact, the deletion of preparatory acts by the Ad Hoc Committee centred round the belief that serious cases of such acts would be caught by the provisions covering conspiracy and complicity in genocide. It was further suggested that attempt and incitement to genocide could also encompass preparatory acts. See generally *Report of the Ad Hoc Committee on Genocide to the Economic and Social Council on the Meetings of the Committee Held at Lake Success* (5 April - 10 May 1948) 7 UN ESCOR Supp (No. 6) 2; (1948) UN Doc E/794.

prevent and to repress such acts wherever they may occur." This was substituted in the preamble of the Ad Hoc Committee draft¹⁴ with, "[t]he High Contracting Parties...agree to prevent and punish the crime", and then deleted altogether from the preamble of the final text of the Convention in favour of proclaiming genocide "a crime under international law which they undertake to prevent and to punish" via Article I. While the debates over just where this provision should be inserted have attracted much attention,¹⁵ comparably little commentary has resulted over the deletion of the original phrase "to *repress* such acts wherever they may occur" (emphasis added). It seems on the plain and ordinary meaning to be given to these terms that intervention, whether military or not, was expressly anticipated by this additional duty "to repress." Furthermore, arguments that obligations are only intended to be territorially based,¹⁶ and therefore excluding intervention by any non-interested party to the conflict, are ruled out by the extension of this duty to "acts wherever they may occur." Should this phrase have remained the culpability of the international community for failing to halt the genocide in Rwanda would arguably have been beyond dispute.

The question then becomes of what impact does its deletion have on the duty to prevent genocide? During the Sixth Committee proceedings on the consideration of the Ad Hoc Committee draft, Mr Kaeckenbeek of Belgium proposed that the duty to prevent and punish in the Ad Hoc Committee preamble should be transferred to Article I in order to strengthen the obligation by substituting "for a purely declaratory statement a solemn commitment, of practical import, to prevent and *suppress* the crime" (emphasis added).¹⁷ Clearly the Belgium representative viewed the Ad Hoc Committee wording as also encompassing a commitment to suppress (or repress) genocide. As this proposal was adopted, and Article I accordingly modified,¹⁸ one could conclude that the duty to repress had been amalgamated into the duty to prevent in the final version of the Convention.

¹⁴ The Ad Hoc Committee was created by the UN Economic and Social Council in early 1948 to prepare a draft convention based on its consideration of the Secretariat draft and other preliminary drafts prepared by Member Governments on the Committee. See generally Schabas, above, chp 2.

¹⁵ Two such sources are Schabas, above, chp 2; Matthew Lippman "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later" (1994) 8 Temp ICLJ 1, 20-22.

¹⁶ These are explored below in Part II B 2 a Reasoning of Judge Lauterpacht.

¹⁷ *Continuation of the Consideration of the Draft Convention on Genocide* (6th Comm, 3d Sess, 67th Mtg, 1948) UN GAOR 44. See also Lippman, above, 21.

¹⁸ *Consideration of the Draft Convention*, above, 68th Mtg, 53.

The mere deletion of words from a treaty clause is not necessarily fatal to the purpose for which they were originally included. One recent example is the finding of the International Criminal Tribunal for Rwanda that in spite of the decision by the drafters of the Genocide Convention to delete a reference to the ability of direct and public incitement to be punished whether it is successful or not, it was nevertheless “of the opinion that it cannot thereby be inferred that the intent of the drafters was not to punish unsuccessful acts of incitement...[they] simply decided not to specifically mention that such a form of incitement could be punished.”¹⁹ This ruling was based on the premise that incitement, like conspiracy and complicity, is an inchoate offence and so, irrespective of the result, it is punishable by virtue of the criminal act alone. Such an interpretation therefore fell within the object and purpose of the Genocide Convention, and was an implicit meaning of the term. By the same token, one could also say the drafters decided not to specifically mention that intervention as a form of prevention may be required, and as the Convention was designed “to liberate mankind from such an odious scourge”,²⁰ then interpreting the duty to prevent as inclusive of, in the very least, a right to intervene may also be implicitly permissible.

2 *Turning the Secretariat's Article XII into Article VIII of the Convention*

Article XII of the Secretariat draft states:

Action by the United Nations to Prevent or Stop Genocide

Irrespective of any provision in the foregoing articles, should the crimes as defined in this Convention be committed in any part of the world, or should there be serious reasons for suspecting that such crimes have been committed, the High Contracting Parties may call upon the competent organs of the United Nations to take measures for the suppression or prevention of such crimes.

In such case the said Parties shall do everything in their power to give full effect to the intervention of the United Nations.

Building on the above arguments, the term “suppression” was carried through to Article VIII of the final Convention. This could be taken to mean that in spite of deleting the preamble’s express reference to the duty to repress, this did not amount to an outright rejection of the ability to intervene for the purposes of suppression of genocide in appropriate cases.

¹⁹ *Prosecutor v Jean-Paul Akayesu* (1998) ICTR 96-4-T, para 561.

²⁰ Convention on the Prevention and Punishment of the Crime of Genocide (9 December 1948) 78 UNTS 277, preamble.

The commentary to the Secretariat draft reveals that Article XII was intended to facilitate preventative action by the United Nations before the onset of a catastrophe that could cause irreparable harm. It noted that the Convention should "bind" the states to do all that is possible to support any United Nations undertaking to prevent or stop genocide because, "if preventive action is to have the maximum chances of success, the Members of the United Nations must not remain passive or indifferent."²¹ By the very wording of Article XII and its commentary, United Nations intervention was envisioned as justified and necessary within the context of genocide.

Ultimately however, the last paragraph of Article XII was removed in its entirety, and the first was modified in favour of a more modest and general text largely put forward by China.²² It must be remembered that the UN Charter had only been signed two years prior, laying down specific principles concerning the prohibition on the use of force [Art 2(4)] except when in self defence [Art 51], and the principle of non-intervention in the internal affairs of another state [Art 2(7)]. Thus, the preference for a more modest approach, which leaves the possibility of intervention as more implicit rather than explicit, is understandable. Yet, the notion of intervention was not the focal point of the heated debate that took place over this provision. Rather, it was an unsuccessful proposal originally put forward by the Soviet Union to the Ad Hoc Committee that was looked on as a move to attribute powers and duties on the Security Council that were not mandated by the Charter.

This defeated proposal was revised by the Soviet delegation and resubmitted to the Sixth Committee:²³

The High Contracting Parties undertake to report to the Security Council all cases of genocide and all cases of a breach of the obligations imposed by the Convention so that the necessary measures may be taken in accordance with Chapter VI of the United Nations Charter.

After consultation with France over its own submission,²⁴ and finally with Iran, the proposal was then further revised and submitted as a tripartite amendment reading:²⁵

²¹ Draft Convention on the Crime of Genocide, Commentary of the UN Secretary-General (1947) UN Doc E/447, 45-46.

²² See "Draft Articles for the Inclusion in the Convention on Genocide Proposed by the Delegation of China on 16 April 1948" UN Doc E/AC.25/9: "Any Signatory to this Convention may call upon any competent organ of the United Nations to take such action as may be appropriate under the Charter for the prevention and suppression of genocide."

²³ *Continuation of the Consideration of the Draft Convention on Genocide* (6th Comm, 3d Sess, 94th Mtg, 1948) UN GAOR 328; UN Doc A/C.6/215/Rev.1 (Mr Morozov, USSR).

The High Contracting Parties may call the attention of the Security Council or, if necessary, of the General Assembly to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security, in order that the Security Council may take such measures as it may deem necessary to stop that threat.

The first revision clearly did not envision the Security Council resorting to Chapter VII enforcement measures that could countenance military intervention for it specifically directs the Council's attention to the pacific settlement procedures of Chapter VI.²⁶ However, its strength is seen in its ability to not only require states to report cases of genocide, but to further compel them to bring all breaches of Convention obligations to the Council's attention as well. Such a strict supervisory regime "would highlight the importance attached to the suppression of genocide."²⁷

However, in order to preserve the reference to the Security Council, the concessions made in the tripartite amendment are immediately apparent. It limits reportable breaches to only those likely to constitute a threat to international peace and security, while replacing the obligatory notification regime with a purely voluntary one for not only the Parties but also the Security Council. While specific reference to the Council was dropped in the final Article VIII in favour of generally empowering the "competent organs of the United Nations" to act, the voluntary notification system was maintained for Contracting Parties. Thus, while the amendment's expansion of the range of measures available to all those "necessary" for the suppression of genocide is affirmed, but rephrased, in Article VIII to all those the UN organs "consider appropriate", this tacit approval of intervention cannot be equated to an obligation on behalf of the United Nations to intervene, or on Contracting Parties to call for such intervention. On the plain and ordinary meaning of

²⁴ The French proposal read: "The High Contracting Parties may call the attention of the Security Council to the cases of genocide and of violations of the present Convention likely to constitute a threat to international peace and security in order that the Security Council may take such measures as it deems necessary to stop the threat." (1948) UN Doc A/C.6/259 (Mr Chaumont, France).

²⁵ *Consideration of the Draft Convention*, above, 102nd Mtg, 421.

²⁶ But see comments of Mr Morozov prior to making this revision in support of possible Chapter VII action: "Any act of genocide was always a threat to international peace and security and as such should be dealt with under Chapters VI and VII of the Charter...Chapters VI and VII of the Charter provided means for the prevention and punishment of genocide, means far more concrete and effective than anything possible in the sphere of international jurisdiction...The obligation to bring to the attention of the Security Council would ensure that States did not evade their obligations." (1948) UN Doc A/C.6/SR.101.

²⁷ Matthew Lippman "The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later" (1994) 8 Temp ICLJ 1, 67 paraphrasing Mr Morozov for the Soviet delegation.

Article VIII, it simply articulates a *right* of states, through the United Nations, to invoke appropriate procedures for the prevention and suppression of genocide under the UN Charter, including Chapter VII action if necessary. In essence, this was also the aim of the Secretariat's Article XII.

* * *

Based on the above, the original duty to prevent imparted a right of intervention that, in light of the powers of Article VIII, arguably could not be objected to by a state invoking the protections of Article 2(7) of the United Nations Charter²⁸ - allowing recourse to organs of the UN to prevent genocide could not conceivably make genocide a matter essentially within a state's domestic jurisdiction. Thus, the Genocide Convention effectively defeats the argument made by Justice Jackson during the drafting of the Nuremberg Charter that were it not for Germany waging an aggressive and illegal war.²⁹

...in which [America] became involved...we [would] see no other basis on which we are justified in reaching the atrocities which were committed inside Germany, under German law, or even in violation of German law, by authorities of the German state.

The Convention was designed to enable the international community to act unhindered by such concerns - but it does not appear that when finally adopted, the duty to prevent genocide entailed an *obligation* to intervene. Whether this remains the accepted approach can be analysed through subsequent practice and interpretation of the Convention.

²⁸ This analysis is convincingly presented by Hans-Heinrich Jescheck "Genocide" in Rudolph Bernhardt (ed) *Encyclopedia of Public International Law* (Vol II, North-Holland Elsevier, Amsterdam, 1995) 541, 542. It is affirmed as a "useful observation" by William A Schabas *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, Cambridge, 2000) 452.

²⁹ "Minutes of Conference Session of 23 July 1945" in *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials* (US Government Printing Office, Washington, 1949) 333.

B *Interpreting the Duty to Prevent in the International Court of Justice (ICJ)*

1 *Obligations erga omnes*

In the *Barcelona Traction*³⁰ case, the ICJ commented that the outlawing of genocide was an obligation owed *erga omnes* - that is it is an obligation owed by all states to the international community as a whole, and is valid against all the world, irrespective of the consent of states to be bound by it. Therefore, this makes it the concern of all states, and all "can be held to have a legal interest in their protection."³¹

The legal basis for this reasoning was drawn from the Court's earlier advisory opinion on the question of reservations to the Genocide Convention. In that opinion, the ICJ held that:³²

...the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence [of the conception that genocide is contrary to moral law and to the spirit and aims of the United Nations] is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.

Essentially, the ICJ affirmed the customary international law status of the Genocide Convention, and as it was intended "to be definitely universal scope", it is beyond question that all states have a legal interest in protecting humanity from this odious scourge. The Court then goes on to make some very interesting observations on the nature of this legal interest:³³

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.

³⁰ *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* [1970] ICJ Reports 3.

³¹ *Barcelona Traction*, above, 32 paras 33-34.

³² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Reports 15, 23.

³³ *Reservations to the Genocide Convention*, above, 23.

The *raison d'être* of the Convention is clearly prevention and punishment of the crime of genocide, as expressed in its title. If these "high purposes" are the common interest of the contracting states, and an obligation owed to the international community as a whole, then it may be possible to assert an obligation to intervene to "safeguard the very existence of certain human groups" where there is a clear outbreak of genocidal behaviour. To not intervene in a case where intervention would be the only effective means to halt the violence would seem to be a clear abrogation of this *erga omnes* obligation. If the Convention's "high ideals" provide the "foundation and measure" of its provisions, then surely the highest of these is eradicating the crime through prevention, and thus the measure of Article I's duty to prevent should be bolstered accordingly.³⁴

If the drafting history goes against these conclusions, then the rhetoric of the dissenting opinions are apt to answer this challenge. In his dissent, Judge Alvarez expressed the dangers of over reliance on the *travaux préparatoires* when dealing with conventions that, in a sense, form the "Constitution of international society, [and] the new international constitutional law."³⁵ Such conventions:³⁶

... must not be interpreted with reference to the preparatory work which preceded them; they are distinct from that work and have acquired a life of their own; they can be compared to ships which leave the yards in which they have been built, and sail away independently, no longer attached to the dockyard. These conventions must be interpreted without regard to the past, and only with regard to the future.

The other four judges delivering a joint dissenting opinion added to this sentiment noting that "the enormity of the crime of genocide can hardly be exaggerated, and any treaty for its repression deserves the most generous interpretation."³⁷

However, whatever the strengths of these arguments, recognition of them through state practice is still instrumental to establishing any such obligation. Under the law of treaties, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" shall be considered.³⁸ This exact concern was addressed in the case below against Yugoslavia.

³⁴ For further development of this argument see below, Part IV B The Impact of *Erga Omnes* Obligations on Humanitarian Intervention.

³⁵ *Reservations to the Genocide Convention*, above, 51 Alvarez J dissenting.

³⁶ *Reservations to the Genocide Convention*, above, 53.

³⁷ *Reservations to the Genocide Convention*, above, 47 Guerrero, McNair, Read, and Mo JJ dissenting.

³⁸ Vienna Convention on the Law of Treaties (22 May 1969) 1155 UNTS 331, art 31(3)(b).

2 *1993 to 1996 proceedings in Bosnia and Herzegovina v Yugoslavia*

On 20 March 1993, Bosnia and Herzegovina (B-H) filed an application in the ICJ for provisional measures against the rump of Yugoslavia - Serbia and Montenegro - alleging acts of genocide had been committed by former members of the Yugoslavia People's Army and by Serb military and paramilitary forces, assisted and directed by Yugoslavia. The allegations included the killing of Muslim inhabitants of B-H and the torture, rape, kidnapping, wounding, starvation, and the physical and mental abuse and detention of the citizens of B-H.³⁹ Of interest for this paper was the allegation that Yugoslavia had breached its legal obligations towards the people and State of B-H under Article I of the Genocide Convention.⁴⁰

Three months after provisional measures were granted to B-H against Yugoslavia, B-H requested of the ICJ further measures charging:⁴¹

.....
5. That all Contracting Parties to the Genocide Convention are *obliged* by Article I thereof 'to prevent' the commission of acts of genocide against the People and State of Bosnia and Herzegovina;

.....
7. That all Contracting Parties to the Genocide Convention have the obligation thereunder 'to prevent' acts of genocide, and partition and dismemberment by means of genocide, against the People and State of Bosnia and Herzegovina;

.....
9. That in order to fulfil their obligations under the Genocide Convention under the current circumstances, all Contracting Parties thereto must have the ability to provide military weapons, equipment, supplies and *armed forces* (soldiers, sailors, airpeople) to the Government of Bosnia and Herzegovina at its request.

(emphasis added)

Clearly, B-H interpreted the Genocide Convention to mean that outside intervention in order to prevent and halt genocide was entirely plausible and mandated by the Convention. The oft-cited separate opinion of Judge Elihu Lauterpacht in the 13 September 1993 order directly explores the validity of this assertion.

³⁹ Facts as summarised by Matthew Lippman "Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium" (2001) 23 *Hous J Int'l L* 467, 511-512.

⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) Requests for the Indication of Provisional Measures* (8 April 1993) [1993] ICJ Reports 16.

⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) Further Requests for the Indication of Provisional Measures* (13 September 1993) [1993] ICJ Reports 325, 332-333.

(a) Reasoning of Judge Lauterpacht

Turning to the fifth request above, Judge Lauterpacht immediately rejected, on the basis of Article I, “[a]ny such narrow view” that would require the Genocide Convention to be interpreted as establishing “no more...for the Contracting States [than] duties that are to be implemented by legislative action within their domestic legal spheres.”⁴² In spite of his concession that “on the face of the Convention most of its provisions are taken up with aspects of the prevention and punishment of genocide *within* the national legal sphere” (emphasis added), the undertaking to prevent and to punish genocide is, nevertheless, “comprehensive and unqualified.”⁴³

He further noted that the purpose of confirming in Article I that “genocide ‘is a crime under international law’...is to permit parties, within the domestic legislation that they adopt, to assume universal jurisdiction over the crime”, meaning therefore that “a breach of duty can arise solely from failure to prevent or solely from failure to punish...” genocide - a duty which, “on the plain meaning of the words of Article I”, logically extends to “the inter-State level.”⁴⁴ Judge Lauterpacht also places much weight on the wording of Article IX of the Convention to infer that “the obligation ‘to prevent’ genocide extends also to the obligation to prevent a State from committing genocide.”⁴⁵ The relevant reference in Article IX is to the inclusion of disputes “relating to the responsibility of a State for genocide” amongst the competent subject-matter jurisdiction of the ICJ.

Thus, it is clearly contemplated that one State can charge genocide against another, and that it is not just the State in which the acts are being committed that has the responsibility to prevent the commission or continuance of those acts. Judge Lauterpacht concludes that there is “no doubt or ambiguity on the face of the text and preliminary scrutiny of the *travaux préparatoires*” that might suggest anything other than “this plain meaning”, thus creating “no difficulty in declaring that all the parties to the Genocide Convention are under a duty to prevent genocide...[at least] in respect of [their] *own* conduct...outside [their] territory...” (emphasis in original)⁴⁶

⁴² *Application of the Genocide Convention (Further Requests)*, above, 443 paras 109-110 separate opinion of Lauterpacht J.

⁴³ *Application of the Genocide Convention (Further Requests)*, above, 442-443 paras 109-110.

⁴⁴ *Application of the Genocide Convention (Further Requests)*, above, 443 paras 110-111.

⁴⁵ *Application of the Genocide Convention (Further Requests)*, above, 443-444 para 111.

⁴⁶ *Application of the Genocide Convention (Further Requests)*, above, 444 paras 112-113, 115.

What becomes more difficult is the suggestion that the application and duties of the Convention, while "obviously [not] absolutely territorial" for "that would be nonsense", extend to disinterested and personally unaffected third party states. This would cause the duty of prevention to "also mean that every party is under an obligation individually and actively to intervene to prevent genocide outside its territory when committed by or under the authority of some other party."⁴⁷ Put another way, he asks does the duty extend to "preventing genocide wherever it may occur", the responsibility of which resting with the international community?⁴⁸ The resonance of the undertaking in the Secretariat draft preamble "to prevent and to repress such acts wherever they may occur" is unmistakable, though Judge Lauterpacht does not refer to this connection.

To answer this, while Article I does not limit the duty of prevention "by reference to person or place so that, on its face, it could be said to require every party positively to prevent genocide wherever it occurs", nevertheless it still "becomes necessary to look at State practice."⁴⁹ Citing a 1985 report on the prevention and punishment of genocide,⁵⁰ he noted that there have been a number of cases of genocide since the Second World War such as:⁵¹

[t]he Tutsi massacre of Hutu in Burundi in 1965 and 1972, the Paraguayan massacre of Aché Indians prior to 1974, the Khmer Rouge massacre in Kampuchea between 1975 and 1978 and the contemporary Iranian killings of Bahai's.

Based on the limited reaction and response of the contracting parties concerning the above incidents, Judge Lauterpacht surmises that, far from being evidence of an acceptance of an obligation to intervene, it may indicate a contrary practice "suggesting the permissibility of inactivity."⁵² Thus, with some reluctance due to being "sympathetic...in principle to the idea of an individual and collective responsibility of States for the prevention of genocide wherever it may occur", Judge Lauterpacht found himself unable, "in the absence of a full treatment of this subject

⁴⁷ *Application of the Genocide Convention (Further Requests)*, above, 444 paras 114-115.

⁴⁸ *Application of the Genocide Convention (Further Requests)*, above, 444 para 113.

⁴⁹ *Application of the Genocide Convention (Further Requests)*, above, 444 para 115.

⁵⁰ B Whitaker, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities *Revised and Updated Report on the Question of the Prevention and Punishment of Genocide* (2 July 1985) UN Doc E/CN.4/Sub.2/1985/6, 9-10 para 24.

⁵¹ *Application of the Genocide Convention (Further Requests)*, above, 444-445 para 115, citing Whitaker Report, above.

⁵² *Application of the Genocide Convention (Further Requests)*, above, 445 para 115.

by both sides, to express a view on it at this stage...[and therefore] unable to accede to the fifth request."⁵³

As this case continues before the ICJ, Judge Lauterpacht has still to traverse the merits of this critical issue. As Parts III and IV below establish, this issue has now become all the more complex today than it was nine years ago, prior to the genocide in Rwanda, when he then felt the evidence went against his moral inclinations toward articulating an obligation to intervene. He was correct to attach such high importance to state practice because if such practice can be shown to be exercised under a sense of binding legal obligation, then a principle of intervention in response to genocide will have begun to carve its way into customary international law. Yet if "permissibility of inactivity" remains, even in some small measure, then although great visionaries like Raphael Lemkin may have rejoiced in the belief fifty-five years ago that in "declaring genocide a crime under international law and by making it a problem of international concern, the right of intervention on behalf of minorities slated for destruction has been established",⁵⁴ unfortunately in practice, the international community has actually done little more in all this time than to declare what it can do, rather than focus the question on just what it will or should do.

(b) Developments of the 1996 proceedings

While not directly picking up Judge Lauterpacht's discussion, the ICJ affirmed that as "the rights and obligations enshrined in the Convention are rights and obligations *erga omnes*...the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention."⁵⁵ This is embellished by the rhetoric of Judge Weeramantry in his separate opinion claiming, "[w]e have reached the stage, today, at which the human rights of anyone, anywhere, are the concern of everyone, everywhere."⁵⁶ However, in contrast, Judge Kreca's dissent took a contra view on the territorial application of the Convention.⁵⁷

What is the status of the Genocide Convention? With respect to the obligation of

⁵³ *Application of the Genocide Convention (Further Requests)*, above, 445 para 115.

⁵⁴ Raphael Lemkin "Genocide as a Crime in International Law" (1947) 41 *Am J Int'l L* 145, 150.

⁵⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) Preliminary Objections* [1996] ICJ Reports 595, 616 para 31.

⁵⁶ *Application of the Genocide Convention (Preliminary Objections)*, above, 647.

⁵⁷ *Application of the Genocide Convention (Preliminary Objections)*, above, 766 para 102 Kreca J dissenting.

prevention of the crime of genocide, the Convention does not contain the principle of universal repression. It has firmly opted for the territorial principle of the obligation of prevention and 'the only action relating to crimes committed outside the territory of the Contracting Party is by organs of the United Nations within the scope of the general competence.' [citing Nehemiah Robinson *The Genocide Convention: Its Origin and Interpretation* (New York, 1949) 13-14.]

If the Genocide Convention did expressly articulate the principle of universal repression then the subject of this paper would largely be a moot point. However, the context of Judge Kreca's comments concerns the implementation or enforcement of the *erga omnes* norm prohibiting genocide. In fact, he is quick to point out the universal applicability of this norm in terms of its capacity to bind all subjects of international law without any conventional obligation.⁵⁸ As he recognises this is a norm establishing obligations "toward the international community as a whole"⁵⁹ he is quite correct in stating that crimes committed outside the territory of a concerned State fall within the realm of the general competence of organs of the United Nations for it is only the United Nations that has the unique mandate to act on behalf of the international community. Thus, while Judge Kreca's analysis would rule out unilateral intervention of a third party State in response to genocide, the suggestion that the obligation of prevention, up to and including the use of force in appropriate circumstances, is incumbent upon the United Nations would seem to be left open.

* * *

On the basis of the foregoing, and in light of the basic principles of the Charter of the United Nations concerning non-intervention, the following sections of this paper will proceed on the premise that it is the United Nations, in its capacity as the international community's representative, that logically must bear the obligation and duty to prevent genocide in situations where the state or states in which the acts occur have failed to adequately prevent or suppress them alone, and therefore necessitating international intervention. The duty to prevent for an individual state would then require support for preventative measures taken by the United Nations, as envisioned by Article XII of the Secretariat draft, and pledged in the preamble of the Convention by recognising that "international co-operation is required." Thus, a state should not actively work towards the effective obstruction of any United Nations intervention.

⁵⁸ *Application of the Genocide Convention (Preliminary Objections)*, above, 765 para 101.

⁵⁹ *Application of the Genocide Convention (Preliminary Objections)*, above, 765 para 101.

III *POLITICAL v LEGAL FAILINGS DURING THE 1994 RWANDAN GENOCIDE*

In the 1999 Report of the Independent Inquiry into the actions of the United Nations during the genocide, clear acknowledgement of the catastrophic failings of the organisation to take preventative action was immediately offered:⁶⁰

The failure by the United Nations to prevent, and subsequently, to stop the genocide in Rwanda was a failure by the United Nations system as a whole... There was a persistent lack of political will by Member States to act, or to act with enough assertiveness.

What is clear from the report is that the greater political rather than legal failings primarily hampered any effective response to the genocide. It specifically noted that:⁶¹

[t]he lack of will to act in response to the crisis in Rwanda becomes all the more deplorable in light of the reluctance by key members of the International Community to acknowledge that the mass murder being pursued in front of global media was a genocide. The fact that what was occurring in Rwanda was a genocide brought with it a *key international obligation to act in order to stop the killing*. The parties to the 1948 Genocide Convention took upon themselves a responsibility to prevent and punish the crime of genocide. This is not a responsibility to be taken lightly. Although the main action required of the parties to the Convention is to enact national legislation to provide for jurisdiction against genocide, the Convention also explicitly opens the opportunity of bringing a situation to the Security Council. Arguably, in this context, the members of the Security Council have a particular responsibility, morally if not explicitly under the Convention, to react against a situation of genocide. (emphasis added)

While deplorable, this extreme reluctance on behalf of Security Council members to charge genocide has deeper implications for the questions raised in this paper. At the heart of it are the reasons why there was such reluctance, and what Member States perceived their obligations under the Convention to be at the time.

A *The Somalia Factor and PDD-25*

The murders of UNOSOM II⁶² personnel, followed by the disastrous campaign carried out by United States Rangers and the Quick Reaction Force in Mogadishu one year prior to the Rwandan genocide, had deep and far reaching effects on the rationale

⁶⁰ *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (15 December 1999) Un Doc S/1999/1257, 3 <<http://www.un.org/News/dh/latest/rwanda.htm>> (last accessed 1 October 2002).

⁶¹ *Independent Inquiry*, above, 38 Part III 5 b Failure to Respond to the Genocide.

⁶² United Nations Operation in Somalia II.

for, and conduct of, peacekeeping operations. The report of the Commission of Inquiry into the events that took place in Somalia concluded that "the UN should refrain from undertaking further peace enforcement actions within the internal conflicts of States."⁶³ As the situation in Rwanda was clearly a fully fledged internal conflict, and this report was released at a time when the Security Council was deliberating over strengthening the UNAMIR⁶⁴ mandate, this finding is crucial to understanding the actions and state of mind of members of the Security Council during the genocidal period. No-one on the Council wanted to see a repeat of Somalia, and as this conflict was viewed in terms of a civil war, albeit one of savage proportions, neither peacekeeping nor military intervention was appropriate in such circumstances - it was "totally impractical" - Somalia had at least taught the United Nations that.⁶⁵

Adding to this, after a year-long comprehensive review of US policy following the Somalia crisis, President Clinton moved to heavily restrict United States involvement in peacekeeping operations by signing and implementing the Presidential Decision Directive on Multilateral Peace Operations (PDD-25) on 3 May 1994. Future involvement with the UN would henceforth depend on strict criteria including:⁶⁶

...whether or not US interests were at stake, whether or not there was a threat to world peace, a clear mission goal, acceptable costs, congressional, public and allied support, a working ceasefire, a clean command and control and a clear exit point.

Aside from international aggression, a threat or breach of the peace must reach the level of an "[u]rgent humanitarian disaster coupled with violence" or a "[s]udden interruption of established democracy or gross violation of human rights coupled with violence, or threat of violence." Further, support for Chapter VI or VII action will be considered if "[t]he political, economic and humanitarian consequences of inaction by the international community have been weighed and are considered unacceptable."⁶⁷

⁶³ *Report of the Commission of Inquiry Established Pursuant to Security Council Resolution 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel Which Led to Casualties Among Them* (1 June 1994) UN Doc S/1994/653 cited in *Independent Inquiry*, above, 41 Part III 7 The Shadow of Somalia.

⁶⁴ United Nations Assistance Mission for Rwanda.

⁶⁵ Linda Melvern *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd, London, 2000) 172.

⁶⁶ As summarised by Melvern, above, 191. See also Presidential Decision Directive 25 on Reforming Multilateral Peace Operations (3 May 1994) <<http://www.fas.org/irp/offdocs/pdd25.htm>> (last accessed 5 October 2002).

⁶⁷ PDD-25, above, Part I i Voting for Peace Operations.

As the first UN operation to come up against PDD-25, the only criterion Rwanda could meet was the rationale that there was a threat to international peace and security based on the violent humanitarian crisis.⁶⁸ Such a threat to peace and security was declared by the Security Council on 17 May 1994 in Resolution 918, warranting the imposition of an arms embargo under Chapter VII of the Charter.⁶⁹ Yet, PDD-25 clearly stipulates that no single factor is decisive in making the determination to commit United States forces to a peacekeeping operation:⁷⁰

[They] are an aid in decision-making; they do not by themselves constitute a prescriptive device...and [decisions] will be based on the cumulative weight of the factors, with no single factor necessarily being an absolute determinant.

While this may be construed as a legal failing directly contributing to the obstruction of any United Nations intervention to halt the genocide, it is more correct to blame its use as a political tool. PDD-25 was not created to obstruct intervention in Rwanda as it pre-existed the genocide, but once released it allowed the United States to replace its clear reluctance on a policy level to commit its troops to another Somalia by cloaking it with what is often called "the austerity of tabulated legalism."⁷¹ Madeline Albright demonstrated this by immediately opposing Boutros-Ghali's 13 May Security Council report recommending UNAMIR's forces be bolstered to 5,500 to protect civilians and provide security for humanitarian operations. She was now championing PDD-25 in accordance with which:⁷²

...her staff said the plan for Rwanda was inadequate and lacking in field assessments. There must be more detailed preparations, a clearer concept of operations, a breakdown in the costs, and an idea of the duration of any mandate.

As mentioned above, if "[t]he political, economic and humanitarian consequences of inaction by the international community have been weighed and are considered unacceptable", as was clearly the position of mostly the non-permanent members of the Council regarding Rwanda, then this would be a strong factor under PDD-25 to support a UN operation. The cumulative weight of this along with the threat to peace and security based on "an urgent humanitarian disaster coupled with violence...or

⁶⁸ Melvern, above, 191.

⁶⁹ Security Council Resolution 918 (17 May 1994) UN Doc S/Res/918, 4 para 13 <<http://www.un.org/Docs/scres/1994/scres94.htm>> (last accessed 1 October 2002).

⁷⁰ PDD-25, above, Part I i Voting for Peace Operations.

⁷¹ These are the much celebrated words of Lord Wilberforce when referring to the tendency to adopt an overly strict or mechanical interpretation of an international convention when they instead, particularly those dealing with human rights, call for a generous and purposive interpretation. See *Minister of Home Affairs v Fisher* [1980] AC 319, 328 (PC).

⁷² Melvern, above, 195.

gross violation of human rights coupled with violence”, would have been the more purposive approach, and arguably enough to satisfy its requirements. In referring to the blame heaped on PDD-25 for placing too many constraints on multilateral military action in Rwanda, David Scheffer, Ambassador-at-Large for War Crimes Issues and former staff drafter of PDD-25, commented that:⁷³

PDD-25 is not a straightjacket to deny justifiable interventions or preventive measures when the lives of thousands of innocent civilians are at stake. It is, and should continue to be, applied realistically, in light of the circumstances that confront the international community and the besieged civilian population at the time.

While appreciating that in the post-Rwanda environment everyone is “all the more sensitive to humanitarian crises and the extent to which they may affect the interests of the United States and of the international community”,⁷⁴ his analysis reiterates the argument that the problem of intervention during the height of the Rwandan crisis lay in the political rather than the legal arena. This reality was apparent to Dr Gregory Stanton, President of Genocide Watch, who decried at a recent conference: “Ultimately the failure to prevent the Rwandan genocide was a political failure. Those with power failed to protect the powerless.”⁷⁵ Without any political will to act by important Member States, and with no apparent appreciation for any legal obligation to do so, the United Nations was effectively estopped from carrying out, or even convincingly asserting, an obligation to intervene in response to genocide. It is at this point where international law fails to protect civilians at risk.

B “Acts of Genocide” but not Genocide

On 8 June 1994 in Resolution 925, the Security Council finally acknowledged “the reports indicating that acts of genocide have occurred in Rwanda” and recalled that “in this context...genocide constitutes a crime punishable under international

⁷³ David J Scheffer, US Ambassador-at-Large for War Crimes Issues (Speech to the Conference on Atrocities Prevention and Response, United States Holocaust Memorial Museum, 29 October 1999) reproduced in US Department of State International Information Programs “Text: Lessons learned in Rwanda Genocide Must Be Implemented” <<http://usinfo.state.gov/products/pdq/pdq.htm>> (last accessed 23 August 2002).

⁷⁴ Scheffer, above.

⁷⁵ Gregory H Stanton, President of Genocide Watch “Could the Rwandan Genocide Have Been Prevented?” (Paper presented to “Generations of Genocide” Conference, London, 27 January 2002) <<http://www.genocidewatch.org/rwandangenocideprevention.htm>> (last accessed 10 October 2002).

law.”⁷⁶ Prefacing genocide with the words “acts of” had become the common lingo employed when broaching the subject of genocide - this time it was China that insisted on the preface, objecting to the use of genocide on its own in the resolution, but it was the United States that had previously been its most ardent follower.

While still a welcome development, it had taken two full months of carnage in order to produce this acknowledgement. As noted by the Independent Inquiry:⁷⁷

The delay in identifying the events in Rwanda as a genocide was a failure by the Security Council. The reluctance by some States to use the term genocide was motivated by a lack of political will to act, which is deplorable. If there is ever to be effective international action against genocide, States must be prepared to identify situations as such, and to assume the responsibility to act that accompanies that definition. (emphasis in original)

Of importance is the recognition that the delay came not from assessing the situation in Rwanda to have amounted to something other than genocide, but rather from a belief that in conceding genocide States would also be conceding that something had to be done to prevent or stop it. In relation to America’s role in the delay, William Schabas believed it “reasonable to deduce that American hesitation at the time was in some way connected with a perception that there was indeed an obligation [to act] under the Convention.”⁷⁸

While America was not the only state to shy away from declaring genocide, indeed Britain claimed such a declaration would make the Security Council “a laughing stock” if it failed to act on it,⁷⁹ it was the semantics of the United States that attracted the most attention. What immediately comes to mind are the famous words of Shakespeare’s Juliet:

Tis but thy name that is my enemy;
.....
What's in a name? that which we call a rose
By any other name would smell as sweet....

[*Romeo and Juliet*, Act II Scene 2]

⁷⁶ Security Council Resolution 925 (8 June 1994) UN Doc S/Res/925, 1 <<http://www.un.org/Docs/scres/1994/scres94.htm>> (last accessed 1 October 2002).

⁷⁷ *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (15 December 1999) Un Doc S/1999/1257, 38 Part III 5 b Failure to Respond to the Genocide.

⁷⁸ William A Schabas “Problems of International Codification - Were the Atrocities in Cambodia and Kosovo Genocide?” (2001) *New Eng L Rev* 287, 302.

⁷⁹ Sir David Hannay, British Ambassador to the UN (28 April 1994) cited in Linda Melvern “Genocide Behind the Thin Blue Line” (1997) 28(3) *Security Dialogue* 333, 341.

Just as Romeo would still have been the man Juliet loved had he any other name but Montague, by the same token, failing to acknowledge what was taking place was genocide did not in reality make it anything other than genocide. However, it seems that for those who did not want the United States to get embroiled in another internal conflict it was felt that recognising "these crimes by their rightful name"⁸⁰ would weaken their argument that nothing should be done.⁸¹

1 April to June 1994: to charge or not to charge genocide?

One of the earliest charges of genocide came from the Representative of the Rwandan Patriotic Front (RPF) to the United Nations in a letter to Colin Keating, the President of the Security Council, on 13 April 1994⁸² - 1 week after the killing began. Shortly after that, on 19 April, Human Rights Watch underestimated the number of dead at 100,000 and then called for use of the term 'genocide'.⁸³ On 29 April, Colin Keating proposed a presidential statement recognising it was genocide, and the Czech Republic Representative, Karel Kovanda, indignantly declared genocide and scoffed at the Security Council's focus on obtaining a ceasefire which "was rather like wanting Hitler to reach a ceasefire with the Jews."⁸⁴ Then, on 4 May, the Secretary-General himself proclaimed in an interview with the US news programme *Nightline* that "[h]ere you have a real genocide, in Kigali."⁸⁵ By 9 May a US Defense Intelligence Agency report confirmed that an "organized parallel effort of *genocide* [was] being implemented by the army to destroy the leadership of the Tutsi community." (emphasis in original)⁸⁶

After one month, no effective action had been taken to attempt to halt the killing. All the Security Council could muster was a declaration echoing the terms of Articles

⁸⁰ See quote at the head of this paper by Bill Clinton cited at Footnote 2.

⁸¹ Interview with Tony Marley, Political Military Advisor for the US State Department 1992-95 (Frontline, "The Triumph of Evil", 26 January 1999) <<http://www.pbs.org/wgbh/pages/frontline/shows/evil/interviews/marley.html>> (last accessed 28 August 2002).

⁸² *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (15 December 1999) Un Doc S/1999/1257, 68 Annex I - Chronology of Events.

⁸³ Samantha Power "Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen" (September 2001) *The Atlantic Monthly* Boston, 84-108 Part VII Genocide? What Genocide? <<http://www.theatlantic.com/issues/2001/09/power.htm>> (last accessed 5 October 2002).

⁸⁴ Linda Melvern *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd, London, 2000) 179.

⁸⁵ *Independent Inquiry*, above, 70 Annex I - Chronology of Events.

⁸⁶ Power, above, Part VII Genocide? What Genocide?

I and II of the Genocide Convention (without actually declaring 'genocide') in its Presidential Statement of 30 April:⁸⁷

[T]he Security Council recalls that the killing of members of an ethnic group with the intention of destroying such a group in whole or in part constitutes a crime punishable by international law.

A 1999 report of the French National Assembly described this circumventing of the Convention's definition of genocide to avoid using the term as "l'hypocrisie la plus totale."⁸⁸

In light of this, United States policy becomes important. Samantha Power notes a discussion paper on Rwanda, dated 1 May, and prepared by the Office of the Secretary of Defence, which clearly expresses official concerns:⁸⁹

1. Genocide Investigation: Language that calls for an international investigation of human rights abuses and possible violations of the genocide convention. *Be Careful. Legal at State was worried about this yesterday - Genocide finding could commit [the U.S. government] to actually 'do something'*. [emphasis added by reporter]

Assuming this is correct, it adds meaning to the statements made by State Department Spokesperson, Christine Shelly, when responding to a question over why the terminology "acts of genocide" was adopted by the United States to refer to the situation in Rwanda. She justified it on the basis that "there are *obligations* which arise in connection with the use of the term [genocide]." (emphasis added)⁹⁰ As Ms Shelly referred to the Genocide Convention and its meaning several times in the briefing, and in an earlier briefing had noted "the use of the term 'genocide' has a very precise legal meaning although it's not strictly a legal determination",⁹¹ the context of her statement appears to suggest she is talking about legal obligations arising from any determination of genocide.

⁸⁷ "Statement by the President of the Security Council Condemning the Slaughter of Civilians in Kigali and Other Parts of Rwanda" (30 April 1994) UN Doc S/PRST/1994/21, 1 <<http://www.un.org/Docs/sc/statements/1994/sprst94.htm>> (last accessed 10 October 2002).

⁸⁸ Cited in William A Schabas *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, Cambridge, 2000) 460.

⁸⁹ Power, above, Part VII Genocide? What Genocide?

⁹⁰ Christine Shelly, US State Department Spokesperson (10 June 1994) Daily Press Briefing No 89 <http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1994/9406/940610db.html> (last accessed 9 October 2002).

⁹¹ Christine Shelly, US State Department Spokesperson (28 April 1994) Daily Press Briefing No 68 <http://dosfan.lib.uic.edu/ERC/briefing/daily_briefings/1994/9404/940428db.html> (last accessed 9 October 2002).

It seems obvious from the outside that “[a]n act of genocide is genocide, just as an act of rape is rape, or an act of murder, murder.”⁹² Yet, when asked “[w]hat’s the difference between ‘acts of genocide’ and ‘genocide’?”, Ms Shelly responded:⁹³

As you know, there is a legal definition of this. There has been a lot of discussion about how the definition applies under the definition of ‘genocide’ contained in the 1948 convention. If you’re looking at that for your determination about genocide, clearly, not all of the killings that have taken place in Rwanda are killings to which you might apply that label.

If these clear non-genocidal killings to which she is referring mean those of the RPF as they advanced on the rebel Hutu Government, then she is correct in not attributing genocide to them. However, just how this is meant to distinguish between “acts of genocide” and “genocide” is very unclear. There is nothing in the Genocide Convention to suggest that *all* the killings undertaken in a given conflict must be of a genocidal nature to constitute genocide overall. Moreover, Article VIII of the Convention expressly applies to action “for the prevention and suppression of *acts of genocide*”, and Article II defines genocide as “any of the following *acts...*” (emphasis added), which would seem to make Shelly’s (and the United States’) whole line of argument and reasoning completely redundant.

Dissatisfaction with her explanations was also apparent in the retort offered by her questioner Alan Elsner: “How many acts of genocide does it take to make genocide?” To which she replied, “that’s just not a question that I’m in a position to answer”, but yet when asked to define an ‘act of genocide’ she directly recited the definition of *genocide* in the Convention which Elsner held her to account for.⁹⁴ Appreciating this false distinction, Secretary of State Warren Christopher, that same day, finally reneged and said: “If there’s any particular magic in calling it genocide, I have no hesitancy in saying that.”⁹⁵

2 *Necessary implications*

It is difficult to come to any other conclusion, based on the above, that under all the diplomatic bravado, and after the first round of reports had been considered, that

⁹² Gregory H Stanton, President of Genocide Watch “Could the Rwandan Genocide Have Been Prevented?” (Paper presented to “Generations of Genocide” Conference, London, 27 January 2002).

⁹³ Daily Press Briefing No 89, above.

⁹⁴ Daily Press Briefing No 89, above.

⁹⁵ Philip Gourevitch *We Wish to Inform You that Tomorrow We will be Killed with Our Families* (Farrar Straus and Giroux, New York, 1998) 153.

by 10 June America could have properly considered the situation to be anything other than simple genocide. Schabas' assertion that this pointed to a perception that there was an obligation to act under the Convention is indeed "reasonable to deduce."⁹⁶

Thus, the comfort in which States allowed for a climate "suggesting the permissibility of inactivity", as Judge Lauterpacht found in September 1993 had now, following Somalia and Rwanda, seemed to have transformed into a sense of disquiet in the international community over inactivity in the face of genocide. The response from America, and hence the Security Council, was to not acknowledge genocide in the hope of avoiding accusations of acquiescence and inaction. When no official position on genocide was proffered in the first two months, no action was taken - yet when it was finally declared on 8 June, within two weeks the Security Council had authorised French military intervention under a Chapter VII mandate.⁹⁷ There is a strong argument to suggest that the latter was the necessary consequence of the former, something Boutros-Ghali appreciated commenting on *Nightline* that "because it is a question of genocide...I am sure that we have the capacity to intervene."⁹⁸ The reality that the United Nations *did* act, even if was too little too late, seems to indicate a tentative acceptance by that time that it would have been unconscionable, whether legally, politically or morally, not to do so once genocide was confirmed.

⁹⁶ See above Part III B "Acts of Genocide" not Genocide.

⁹⁷ See Security Council Resolution 929 (22 June 1994) UN Doc S/Res/929, 2 para 3. The resolution authorised under Chapter VII the use of "all necessary means to achieve the humanitarian objectives." <<http://www.un.org/Docs/scres/1994/scres94.htm>> (last accessed 1 October 2002).

⁹⁸ Cited by Linda Melvern *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd, London, 2000) 190.

IV POST-RWANDA: MOVING TOWARDS A NEW LAW AND POLITICS OF HUMANITARIAN INTERVENTION IN RESPONSE TO GENOCIDE

After the Rwandan genocide, United States officials - most likely somewhat embarrassed over the whole affair - began to re-examine the nature of the obligation to prevent genocide, and whether this imposed a duty on parties to the Genocide Convention to intervene militarily in order to halt the violence. In 1998 David Scheffer presented his views to a Washington conference on genocide prevention:⁹⁹

There needs to be a better understanding of Article II [*sic*] of the Genocide Convention. Under Article II [*sic*], states parties confirm that genocide, whether committed in time of peace or war, is a crime under international law that they undertake to prevent and punish. The U.S. Senate, in ratifying the Genocide Convention, understood this to express the general purpose and intent of states parties, without adding any independent or specific obligation to the Genocide Convention. A state party may choose from among a range of measures: diplomatic pressure, economic sanctions, judicial initiatives, or the use of military force to 'undertake' to prevent or punish genocide. But the state party's choice is necessarily discretionary. No government should be intimidated into doing nothing by the requirements of Article II [*sic*]; rather, every government should view it as an opportunity to react responsibly if and as genocide occurs.

In spite of the implications of America's delay in admitting genocide in Rwanda, the sentiment above is not new and found resonance at the time in a response from Christine Shelly to a question on whether the United States Government is required to stop a genocide once declared:¹⁰⁰

[M]y understanding of the issue is whereas there is not an absolute requirement if a determination on genocide is made to intervene directly in the particular crisis under international law - and particularly under the 1948 Genocide Convention - there are several ways which are outlined...in that for proceeding under international law to investigate and ultimately take actions related to the crime of genocide.

Yet, a niggling feeling remains that these comments are somewhat out of vogue in contemporary thinking on the subject of genocide. Aside from Rwanda, atrocities committed against civilians in the last decade in other regions such as Iraq, Bosnia, Somalia, Kosovo, and East Timor, though not all reaching the level of genocide, have, in the very least, bolstered the justifications for the doctrine of humanitarian intervention. It has resulted in a proliferation of the oft-cited mantra from the

⁹⁹ David J Scheffer, US Ambassador-at-Large for War Crimes Issues (Speech to the Conference on "Genocide and Crimes Against Humanity: Early Warning and Prevention", United States Holocaust Memorial Museum, 10 December 1998) reproduced in US Department of State International Information Programs "Responding to Genocide and Crimes Against Humanity" <<http://usinfo.state.gov/products/pdq/pdq.htm>> (last accessed 23 August 2002).

¹⁰⁰ Christine Shelly, US State Department Spokesperson (28 April 1994) Daily Press Briefing No 68.

Holocaust "never again", arguably leading to the creation of "a rejuvenated Security Council that now considers abuses of human rights within the borders of sovereign states to be matters that concern international peace and security and that compel its intervention."¹⁰¹ While such abuses would need to be of an egregious nature to support this assertion, the point is the tide seems to be turning in favour of prevention rather than punishment alone, particularly when dealing with cases of genocide.

A Resolving Hesitations with the Doctrine of Humanitarian Intervention

In the *Corfu Channel*¹⁰² case, the United Kingdom argued for a "new and special application of the theory of intervention" that would allow for the intervening state to "secure possession of evidence in the territory of another State, in order to submit to an international tribunal and thus facilitate its task."¹⁰³ However, the ICJ was unable to accept this line of argument on the basis that it could only regard it as "the manifestation of a policy of force", which in the past has "given rise to most serious abuses, and...cannot, whatever be the present defects in international organisation, find a place in international law."¹⁰⁴

The general and well accepted prohibition on external intervention was then more clearly pronounced by Judge Alvarez:¹⁰⁵

The intervention of a State in the internal or external affairs of another - i.e., action taken by a State with a view to compelling another State to do, or to refrain from doing, certain things - has long been condemned. It is expressly forbidden by the Charter of the United Nations. The same applies to other acts of force, and even to a threat of force.

...The Court must reaffirm, as often as the occasion arises, that intervention and all other kinds of forceable action are not permissible, in any form or on any pretext, in relations between States; but the Court may excuse such acts in exceptional circumstances.

Exactly what the "exceptional circumstances" might be Judge Alvarez does not elaborate on, but as this case was decided in 1949 it would be a leap of faith to conclude he may have been referring to intervention for humanitarian purposes.

¹⁰¹ William A Schabas "Sentencing by International Tribunals: A Human Rights Approach" (1997) 7 *Duke J Comp & Int'l L* 461, 515.

¹⁰² *Corfu Channel (UK v Albania) Merits* [1949] ICJ Reports 4.

¹⁰³ *Corfu Channel*, above, 34.

¹⁰⁴ *Corfu Channel*, above, 35.

¹⁰⁵ *Corfu Channel*, above, 47 individual opinion of Alvarez J.

The principle of non-intervention has also on numerous occasions been affirmed by the General Assembly. In Resolution 2625(XXV) of 1970, it declared:¹⁰⁶

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

However, the common proviso that follows such enunciations preserves the inherent right of the United Nations for collective intervention, maintaining that nothing in these principles "shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security."¹⁰⁷ Genocide, as a *jus cogens* crime, an *erga omnes* obligation, a recognised threat to international peace and security, and an egregious violation of human rights that cannot be within the internal or external affairs of the offending state, necessarily infers that intervention in order to prevent or halt it must therefore fall outside this general prohibition. In that regard, Judge Alvarez's assertion "that intervention and all other kinds of forceable action are not permissible, *in any form or on any pretext*, in relations between States" (emphasis added) is pitched too high, even in spite of his qualification that "the Court may excuse such acts in exceptional circumstances", because it is submitted that no excuse need be made when reacting to genocide - short of commanding a proportionate response.

Thus, it is not difficult to support a rationale of justified humanitarian intervention in response to genocide in light of these factors, and also the relevant provisions of the United Nations Charter that require the organisation to promote respect for and observance of fundamental human rights.¹⁰⁸ However, a 1986 British Foreign Office Policy Document illustrates that relative discomfort still surrounded the doctrine prior to the end of the Cold War. While conceding that a "substantial body of opinion and of practice" exists to support the rationale that when violations of

¹⁰⁶ *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations* (24 October 1970) GA Res 2625 (XXV). For similar statements of this principle, see also *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty* (21 December 1965) GA Res 2131 (XX); *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States* (9 December 1981) GA Res 36/103, para II(a) <<http://www.un.org/documents/ga/res/36/a36r103.htm>> (last accessed 10 October 2002).

¹⁰⁷ GA Res 2625 (XXV), above. See also GA Res 36/103, above, para 6 "Nothing in this Declaration shall prejudice action taken by the United Nations under Chapters VI and VII of the Charter of the United Nations."

¹⁰⁸ Charter of the United Nations (26 June 1945) 59 Stat 1031, arts 1(3) and 55(c).

body of opinion and of practice" exists to support the rationale that when violations of human rights occur "that shock the conscience of mankind, intervention in the interest of humanity is legally permissible", it nonetheless determined that such state practice "provides an uncertain basis" for the doctrine, particularly when "history has shown that humanitarian ends are almost always mixed with other less laudable motives for intervening."¹⁰⁹ This appeared to be the case with *Opération Turquoise*, the French intervention in Rwanda, which has often been accused of being more of a political, as opposed to humanitarian, exercise.¹¹⁰ The policy document concludes that there are three reasons that militate against a right, and hence a duty, of humanitarian intervention: the UN Charter and modern international law do not specifically incorporate it; state practice, especially since 1945, only presents at best a handful of genuine cases; and the scope for abuse of the doctrine weighs strongly against its creation, and therefore "its doubtful benefits would be heavily outweighed by its costs in terms of respect for international law."¹¹¹

However, the plethora of internal conflicts in the 1990s became the catalysts for a re-evaluation of such critiques, and if an obligation to act exists, the interventions in these conflicts have been incremental in its establishment.

1 *The Iraqi precedent*

Following the defeat of the Iraqi army occupying Kuwait, civilian rebellions against Saddam Hussein's rule took place in Northern and Southern Iraq, only to be ferociously put down by the still strong Iraqi army. This created a flood of well over one million Kurdish refugees to the Turkish and Iranian borders, many of them perishing in their flight. In the very least, the actions of the Iraqi forces constituted egregious violations of human rights, and at worst, war crimes and/or grave breaches of the 1949 Geneva Conventions, and crimes against humanity.

Resolution 688 (1991) was adopted by the Security Council to address "the magnitude of human suffering" caused by such acts "which threaten international

¹⁰⁹ United Kingdom Foreign Office Policy Document No 148 (1986) 57 BYIL 614, para II (20).

¹¹⁰ Linda Melvern *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd, London, 2000) 210.

¹¹¹ Foreign Office Policy Document, above, para II (22).

to all humanitarian organizations to contribute to...humanitarian relief efforts" as required by the Secretary-General.¹¹³ Of importance is the fact these requests were not made under the Chapter VII mandate that had previously been invoked during the Gulf War, and so in theory, Resolution 688 was subject to the Article 2(7) non-intervention principles of the Charter. Thus, the subsequent establishment of 'safe havens' to provide protection and humanitarian assistance for the Kurdish populations inside Northern Iraq by American, British, and French land forces appeared to clash with these principles.

What is interesting is the rapid change in the British position on humanitarian intervention from the Foreign Office Policy in 1986, to being prepared in 1992 "to recognise an evolution in the law concerning humanitarian intervention in a case such as Iraq."¹¹⁴ In the course of questioning before the UK Foreign Affairs Committee, Mr Aust, a Legal Counsellor for the Foreign and Commonwealth Office, noted that as Resolution 688 recognised the existence of a severe human rights and humanitarian situation in Iraq, the United Kingdom, America, and France took action "in exercise of the customary international law principle of humanitarian intervention."¹¹⁵ Here he claimed the "practice of states...over a long period" had established this right, whereas six years earlier "state practice in the *past two centuries*" (emphasis added) was seen to be "an uncertain basis on which to rest such a right" and "at best provides only a handful of genuine cases of humanitarian intervention."¹¹⁶ The point to make here is that now there appears to be an acceptance of the validity of this state practice, and while it is couched in terms of a customary *right* to intervention, it still represents a marked change in the attitude towards gross violations of human rights, and the emergence of feelings that the international community cannot stand idly by when such situations arise. As noted by Mr Aust, if there is the will, then "international law in this field develops to meet new situations."¹¹⁷

¹¹³ SC Res 688 (1991), above, 32.

¹¹⁴ David J Harris *Cases and Materials on International Law* (5th ed, Sweet & Maxwell, London 1998) 920.

¹¹⁵ Statements of Mr Aust, FCO Legal Counsellor "Memorandum to the Foreign Affairs Committee" (1992) reproduced in Harris, above, 921.

¹¹⁶ Contrast Statements of Mr Aust, above, 921 with Foreign Office Policy Document No 148 (1986) 57 BYIL 614, paras II (21-22).

¹¹⁷ Statements of Mr Aust, above, 921.

2 *The effect of Bosnia and Somalia*

Following Iraq, an emboldened, and somewhat empowered, Security Council took on greater responsibility for humanitarian crises. In contrast to the Iraqi situation, the interventions in Bosnia and Somalia were mandated under Chapter VII, and were clearly actions of the United Nations (in the sense of the creation of UN forces) rather than those of a particular state or group of states.

Unlike Iraq, these conflicts (particularly Somalia) were civil wars which meant the Security Council's concern was directly focused on the humanitarian crisis within. In Resolution 770 (1992) the Council recognised that "the provision of humanitarian assistance in Bosnia and Herzegovina is an important element in the Council's efforts to restore international peace and security."¹¹⁸ Resolution 794 (1992) also expressed similar sentiment:¹¹⁹

...the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.

In light of the zeal with which the Council approached the humanitarian issue, Schabas' observation, mentioned above, that the world is witnessing a "rejuvenated Security Council that now considers abuses of human rights within the borders of sovereign states to be matters...that compel its intervention",¹²⁰ is particularly appropriate here. It seems too dismissive to reason such practice away as a simple exercise of the international community's right of intervention in humanitarian disasters. It is more likely the resort to Chapter VII enforcement measures in these cases is undertaken under a sense of obligation, especially considering the Council's duty to safeguard international peace and security which it clearly states these situations threaten.¹²¹

It would therefore be more correct, though problematic, to speak of a right of humanitarian intervention only on behalf of individual states, but a responsibility and

¹¹⁸ Security Council Resolution 770 (13 August 1992) UN Doc S/Res/770 <<http://www.un.org/documents/sc/res/1992/scres92.htm>> (last accessed 10 October 2002).

¹¹⁹ Security Council Resolution 794 (3 December 1992) UN Doc S/Res/794 <<http://www1.umn.edu/humanrts/peace/docs/scres794.html>> (last accessed 10 October 2002).

¹²⁰ See above Part IV Post-Rwanda: Moving Towards a New Law and Politics of Humanitarian Intervention in Response to Genocide - Footnote 101.

¹²¹ Charter of the United Nations (26 June 1945) 59 Stat 1031, art 24(1) expressly refers to the Council's "responsibility" and "duties" in the maintenance of international peace and security.

duty of the United Nations to mandate such intervention when dire human rights situations necessitate it. Clearly genocide is such a situation, and if talking in absolutes, it must be seen to have the most legitimate claim on the existence of such an obligation over all other fundamental human rights violations. The disaster of Somalia effectively diluted the political appetite for such intervention that had been fostered by Iraq and Bosnia, so when Rwanda finally exploded the failure to act could not have resulted from the lack of an obligation to intervene, but rather from an acute awareness that an acknowledgement of genocide would mean the international community would be compelled to do so.

B *The Impact of Erga Omnes Obligations on Humanitarian Intervention*

Building on the principles raised in the *Barcelona Traction* case and the aforementioned arguments concerning the impact of *erga omnes* obligations on the duty to prevent genocide,¹²² Professor Stephen Toope concludes that as “the prevention of genocide *must* fall within the definition of an *erga omnes* obligation...this would give rise to an individual duty upon states to act in cases of apprehended genocide.” (emphasis in original)¹²³ His basis for this argument is complex. He notes that the ICJ in the *Barcelona Traction* case held that as *erga omnes* obligations are owed by a state towards the international community as a whole, this meant that all states have a legal interest in the protection of such *rights*.¹²⁴ Professor Toope found it particularly interesting that the Court equated the terms “obligations” and “rights”:¹²⁵

I see this confluence of concepts as intentional and important. The *obligation* owed *erga omnes* does not necessarily give rise to a corresponding duty to insist upon the enforcement of the obligation. However, if there is a *right* to expect the performance of *erga omnes* obligations, a right vested collectively in “the international community as a whole” (to quote the World Court), then an argument can be traced out that individual states are burdened with a duty under customary law to enforce the obligation, just as they have agreed to within the treaty regime of the *Genocide Convention*. (emphasis in original)

¹²² See above Part II B 1 Obligations erga omnes.

¹²³ Stephen J Toope “Does International Law Impose a Duty Upon the United Nations to Prevent Genocide?” (2000) 46 McGill LJ 187, 193.

¹²⁴ Toope, above, 193; see also *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* [1970] ICJ Reports 3, 32 paras 33-34.

¹²⁵ Toope, above, 193.

Thus, if states have the right to expect the performance of the obligation to prevent genocide, taking Professor Toope's argument one step further, then the United Nations, as the legitimate representative of all states, must be burdened with this duty under customary international law to perform the obligation. As this may require recourse to intervention, individual states - in order to ensure the enforcement of this *erga omnes* obligation - would then be required to support the actions of the United Nations in this sphere. This is why the prevention of genocide is "an *erga omnes* obligation par excellence"¹²⁶ because states have a right to expect and ensure its enforcement. In such a case, humanitarian intervention in response to genocide would be beyond reproach.

C *Jus Cogens Issues: Genocide and the Unilateral Use of Force*

Even if states are so required to support United Nations action in response to genocide, to say that this would in practice stop a permanent member exercising their power of veto in the Security Council if it were fundamentally opposed to any such intervention is to be a little too idealistic considering the present state of world affairs. NATO's intervention in Kosovo in March 1999, and now America threatening to take its "war on terror" to Iraq (though not because of genocide) serve as pertinent reminders.

This paper has argued the case for the existence of an obligation upon the United Nations to intervene, but if it is prevented from doing so does this mean that the duty to prevent genocide then demands unilateral intervention by an individual state or group of states? Arguments in favour of such a proposition are based on the acceptance that the prohibition of genocide is a *jus cogens* norm of such a peremptory and non-derogable nature that its prevention must also rise to that level. This means, under the law of treaties, that when "a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."¹²⁷ As a treaty under Article 5 of the Vienna Convention,¹²⁸ the provisions in the Charter of the United Nations prohibiting the use of force other than in self defence, or when mandated by the Security Council, would appear to fall foul

¹²⁶ Toope, above, 193.

¹²⁷ Vienna Convention on the Law of Treaties (22 May 1969) 1155 UNTS 331, art 67.

¹²⁸ Vienna Convention, above, art 5 "The present Convention applies to any treaty which is the constituent instrument of an international organization..."

of this rule to the extent they might prevent unilateral intervention in response to genocide in cases where the Security Council is estopped from intervening itself.

This, coupled with the treaty based obligation on states parties to prevent genocide in Article I of the Genocide Convention, appears on first glance to be convincing. However, the key problem is that the prohibition on the use of force other than in circumstances permitted under the Charter is also considered to be a *jus cogens* norm, and thus the merits of the argument immediately dissipate.¹²⁹ William Schabas, usually keenly supportive of an obligation to intervene, nevertheless expresses reservations with any such justifications for unilateral intervention:¹³⁰

Tolerating individual initiatives in the absence of Security Council permission is a slippery slope that threatens chaos. The consequences for international human rights are potentially as serious as those of any genocide.

1 *The influence of Kosovo and America's "war on terror"*

Aside from the illegality issue, the positive influence that NATO's intervention in Kosovo had on establishing an obligation to intervene in response to genocide is quite clear. The belief that genocide and persecution against the Kosovar minority may have been taking place in the region was a driving force (aside from strategic and political motives) behind the use of force. In an interview, David Scheffer referred to "clear indications of genocide" - something NATO leaders had also spoken of, and even Kofi Annan warned of "the dark cloud of the crime of genocide."¹³¹

Even though it later appeared that the situation did not actually rise to that level, and the Security Council was seen to be stalemated by the veto, it is the prompt reaction and willingness to charge genocide, and then use that charge as the basis for the use of force, that indicates states are well aware of the special legitimacy that genocide brings to intervention. While not directly asserting the campaign was undertaken because of an obligation to act in such circumstances, the rhetoric above

¹²⁹ Robert Jennings and Arthur Watts *Oppenheim's International Law* (9th ed, vol 1, Longman, London, 1996) 7-8.

¹³⁰ William A Schabas *Genocide in International Law: The Crime of Crimes* (Cambridge University Press, Cambridge, 2000) 502.

¹³¹ Schabas, above, 499-500 citing Interview with David Scheffer, US Ambassador-at-Large for War Crimes Issues (CNN, 18 April 1999); John M Broder "In Address to the Nation, Clinton Explains Need to Take Action" (25 March 1999) *New York Times*; "Statement by the United Nations Secretary-General to the Commission on Human Rights" (7 April 1999).

at least demonstrates an awareness of an obligation not to look away and cast a blind eye to such atrocities. It also goes some way in removing the hesitations over intervention in internal conflicts that plagued the Rwandan genocide. In this regard, Alan Kuperman noted that United States policymakers now accepted that an exception to the rule that "U.S. ground troops generally should not be used in humanitarian interventions during ongoing civil wars...should be made for cases of genocide."¹³²

Further, following the terrorist attacks of September 11, 2001, America's "war on terror" has been refocused on Iraq, threatening military intervention in order to force Saddam Hussein to disarm and destroy all "weapons of mass destruction" - otherwise America will see to their destruction itself. While the campaign is not concerned with genocide, the United States National Security Strategy states that America will "wage a war of ideas" to win the battle against terrorism which includes:¹³³

[U]sing the full influence of the United States, and working closely with allies and friends, to make clear that all acts of terrorism are illegitimate so that terrorism will be viewed in the same light as slavery, piracy, or *genocide: behavior that no respectable government can condone or support and all must oppose.* (emphasis added)

On any reading this sounds like promoting a policy of zero-tolerance for terrorism, just as there already exists, based on the wording of the Strategy, such a policy for the crime of genocide. A strong argument can be made that zero-tolerance according to America clearly means intervention whenever and wherever so required. The Strategy's opening remarks support such an approach declaring:¹³⁴

History will judge harshly those who saw this coming danger but failed to act. In the new world we have entered, the only path to peace and security is the path of action.

Curiously, these words have a close affinity with those of Kofi Annan's when questioned on the lack of political will and failure to act in Rwanda, he too said "Everyone involved will be harshly judged by history."¹³⁵

¹³² Alan J Kuperman "Rwanda in Retrospect" (2000) 79(1) Foreign Affairs 94.

¹³³ National Security Strategy of the United States of America (September 2002) 6 <<http://www.whitehouse.gov/nsc/nss.pdf>> (last accessed 13 October 2002).

¹³⁴ National Security Strategy, above, Introduction.

¹³⁵ Interview with Kofi Annan (July 1994) cited in Linda Melvern *A People Betrayed: The Role of the West in Rwanda's Genocide* (Zed Books Ltd, London, 2000) 236.

2 *Non-military countermeasures as a compromise to the use of force*

Under Chapter VII, Article 41 of the Charter of the United Nations, measures not involving the use of force, but constituting intervention nonetheless, are expressly provided for:

These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

In the case of Rwanda, where clear and insidious direct and public incitement to commit genocide was communicated primarily via the radio station Radio-Télévision Libre des Mille Collines (RTLM), the jamming of radio broadcasts would have gone a long way in stemming the tide of violence.¹³⁶ The RPF had called upon the Security Council to take such action, but the request was largely overlooked and ignored.¹³⁷

The Report of the International Commission on Intervention and State Sovereignty concluded that the resort to military force should be one of "last resort" and thus all lesser forms of intervention should first be explored.¹³⁸ Based on this, the Security Council should have turned its mind to alternative means of intervention in Rwanda with much greater fervour - especially when political will to act militarily was so absent. An obligation to intervene would then become more closely aligned with the inherent connotations in the phrase "undertake to prevent" the crime of genocide, as jamming the airwaves, for example, would have just as much, if not more, preventative impact than it would for the purposes of suppression of violence.

¹³⁶ For a comprehensive review of the law on radio jamming see Jamie F Metzl "Rwandan Genocide and the International Law of Radio Jamming" (1997) 91 Am J Int'l L 628.

¹³⁷ *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda* (15 December 1999) Un Doc S/1999/1257, 72 Annex I: Chronology of Events.

¹³⁸ International Commission on Intervention and State Sovereignty *The Responsibility to Protect* (December 2001) paras 4.3-4.9 <<http://www.iciss-ciise.gc.ca/Report-English.asp#rights>> (last accessed 13 October 2002).

V CONCLUSIONS

In essence, Alan Kuperman's assertion, and truism to a certain extent, that "[t]he most obvious lesson of Rwanda's tragedy is that intervention is no substitute for prevention",¹³⁹ should clearly be the primary ambition and goal of the duty to prevent genocide as established by the Genocide Convention. However, an equally clear lesson from Rwanda is that when prevention has failed and genocide has erupted, there can be no substitute for intervention, whatever form it takes. For the Convention's duty to prevent to have any substantive and effective meaning, states must be prepared to give it a purposive interpretation so that it is apt to answer the specific and unique challenges each individual situation inevitably brings. As Judge Alvarez concluded, conventions such as the Genocide Convention "must be interpreted without regard to the past, and only with regard to the future."¹⁴⁰

Despite the shortcomings, there can be no doubt over the significant progress that has been made in the development of the law and politics surrounding humanitarian intervention. Perhaps the emergence of genocide as a special and particularly important case for intervention will also move states to strive for international consensus on the parameters of humanitarian intervention. Kofi Annan challenged the General Assembly in 2000 to do just this:¹⁴¹

...if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that affect every precept of our common humanity?

Thus, a conservative view of the duty to prevent that extends only to an individual state's sphere of interest may not have caused much concern at all prior to the 1990s, but the surge in violent internal conflicts, and the shocking occurrence of two genocides within the first five years of the last decade that were recognized threats to international peace and security, now seems to militate against such an interpretation.

¹³⁹ Alan J Kuperman "Rwanda in Retrospect" (2000) 79(1) *Foreign Affairs* 94, 117.

¹⁴⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Reports 15, 53 Alvarez J dissenting. See above Part II B 1 Obligations Erga Omnes.

¹⁴¹ Cited by Gareth Evans, Co-Chair of the International Commission on Intervention and State Sovereignty "The Responsibility to Protect: Humanitarian Intervention in the 21st Century" (2002 Wesson Lecture in International Relations Theory and Practice, Stanford University, 27 February 2002) <http://www.garethevans.dynamite.com.au/speechtexts/Stanford_Wesson_27ii02.htm> (last accessed 13 October 2002).

While many of the acts taken by states in response to genocide can point to the emergence of an obligation to intervene, not the least of which being the deliberate avoidance of the term genocide during the Rwandan crisis by America and the Security Council, the law and politics surrounding this are still too uncertain to convincingly assert that a new rule of customary international law has developed. There are still too many holes in state practice, particularly in the area of direct and public statements asserting such an obligation - condemnation of failures to act, as in Rwanda, is not enough.

For example, there would need to be evidence of a clear and express commitment by states to intervene - by all necessary means, up to and including the use of force - to prevent genocide. This could take several forms:

- passing a General Assembly resolution to that effect;
- a commitment added to the constituent document of an international organization supporting the principle;
- a statement or multilateral agreement on such an interpretation of the duty to prevent between regional organisations;
- a concerted attempt to examine the issue in many of the international genocide prevention working groups that are sponsored by governments;
- an amendment or protocol to the Genocide Convention
- clear and decisive action in response to future cases of genocide seen to be undertaken under a sense of binding legal obligation.

In the end, no matter what the virtues of asserting an obligation to intervene as a natural corollary to the duty to prevent genocide, it will take much political will to bring this to fruition. It should be remembered that sometimes it just takes one small step for the rest to follow. In this light, the wise words of Judge Read are most appropriate:¹⁴²

It takes one bold act to transform the unthinkable into the thinkable, and a second or third to make it a normal course.

Hopefully this one bold act will not wait for the next genocide, but rather be a decisive move to eradicate perceptions that intervention may once again be withheld.

¹⁴² Cited by Judge Mohamed Shahabuddeen in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)) Further Requests for the Indication of Provisional Measures* (13 September 1993) [1993] ICJ Reports 325, 369.

Appendix I

Convention on the Prevention and Punishment of the Crime of Genocide 1948 *Articles I to IX*

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,

Recognizing that at all periods of history genocide has inflicted great losses on humanity, and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

Hereby agree as hereinafter provided:

Article I: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III: The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article IV: Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V: The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of

the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI: Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Article VII: Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition. The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII: Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX: Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

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